Supreme Court, U.S.
FILED

03 No. 106 JUL 17 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

The Federal Democratic Republic of Ethiopia
and The Commercial Bank of Ethiopia,
Petitioners,

v.

Hiwot Nemariam; Belay Redda; Sertzu Gebremeskel; Mebrahtu Gebremedhin; Fekadu Andemeskal; and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

W. DEVIER PIERSON
Counsel of Record
KNOX BEMIS
ERICA L. SALMON
PIPER RUDNICK LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

119 pp

QUESTIONS PRESENTED

1. Whether international state-to-state tribunals where claims are espoused by the state on behalf of individual claimants are *per se* disqualified as adequate alternative forums under the doctrine of *forum non conveniens* and, if so, whether such disqualification is inconsistent with the broad and flexible doctrine of *forum non conveniens* set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), authorizing trial courts to dismiss suits that should more appropriately be adjudicated in foreign forums.

2. Whether the bar to the application of the doctrine of *forum non conveniens* to such international state-to-state tribunals is inconsistent with the U.S. policy favoring utilization of state-to-state tribunals and settlements to resolve claims arising from disputes between sovereign nations and nationals of other states.

3. Whether the bar to the application of the doctrine of *forum non conveniens* to such international state-to-state tribunals is contrary to the U.S. policy objective of avoiding undue burdens on U.S. courts which result from required adjudication of claims of foreign nationals in which there is no direct U.S. interest and an alternate forum is available.

PARTIES TO THE PROCEEDING BELOW

The appellees before the court of appeals were The Federal Democratic Republic of Ethiopia and The Commercial Bank of Ethiopia. The appellants before the court of appeals were Hiwot Nemariam, Belay Redda, Sertzu Gebremeskel, Mebrahtu Gebremedhin, Fekadu Andemeskal, and Mebrat Gebreamlak, widow and personal representative of the estate of Tedros Asfaha, on behalf of themselves and all others similarly situated as a putative class.

RULE 29.6 STATEMENT

The Commercial Bank of Ethiopia is a public enterprise engaged in commercial banking that is wholly owned by the Government of Ethiopia.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

A. The Nature of Respondents' Claims 2

B. The December 12, 2000 Agreement Terminating the Armed Conflict between Ethiopia and Eritrea and Establishing the Claims Commission. 3

C. The Presentation of Respondents' Claims to the Claims Commission 5

D. The District Court's Dismissal of the Suit on the Ground of *Forum Non Conveniens* and the Court of Appeals' Reversal of the District Court. 7

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW IMPOSES A *PER SE* DISQUALIFICATION OF STATE-TO-STATE ARBITRAL TRIBUNALS SUCH AS THE CLAIMS COMMISSION FOR PURPOSES OF THE DOCTRINE OF *FORUM NON CONVENIENS* IN CONFLICT WITH THIS COURT'S DECISION IN *PIPER*. 8

A. This Court in *Piper* Established the Doctrine of *Forum Non Conveniens* as a Broad and Flexible Mechanism to Enable U.S. Courts to Dismiss Claims That Should More Appropriately be Adjudicated in Foreign Forums. 8

B. The Decision Below Disqualifies State-to-State Arbitral Tribunals *Per Se* Where State Espousal Is the Procedure by Which Private Claims Are Adjudicated. 11

C. The Court of Appeals' *Per Se* Disqualification of State-to-State Tribunals is Contrary to *Piper*. 16

II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL APPELLATE COURTS CONCERNING THE ADEQUACY OF ALTERNATIVE FOREIGN FORUMS FOR PURPOSES OF A *FORUM NON CONVENIENS* ANALYSIS. 17

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE POLICIES OF THE UNITED STATES REGARDING THE ADJUDICATION OF FOREIGN CLAIMS. 21

A. The Disqualification of State-to-State Tribunals Is in Conflict with the Decisions of This Court and Lower Courts Upholding the Use of Such Procedures to Adjudicate International Disputes. 21

B. The Ruling of the Court of Appeals Is Contrary to the Policy of This Court and the Government of the United States Favoring the Resolution of International Disputes Through Arbitral Tribunals. 23

C. The Ruling Undermines a Necessary Device for Limiting the Litigation of Purely Foreign Disputes in United States Courts. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Pages**

Abrahim-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997) 16,22,23

Aguinda v. Texaco, Inc. 303 F.3d 470 (2d Cir. 2002) 19

American Ins. Assoc. v. Garamendi, 2003 U.S. LEXIS 4797 (June 23, 2003) 14,26

Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220 (3d Cir. 1995) 20

Dames & Moore v. Regan, 453 U.S. 654 (1981) 14,15,21,22,23,25

El-Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996) 20

Ford v. Brown, 319 F.3d 1302 (11th Cir. 2003) 16

Gonzalez v. Chrysler Corp., 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (2003) 18

Gschwind v. Cessna Aircraft Co., 161 F.3d 602 (10th Cir. 1998) 19

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 8,10,11

In re Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir. 1987) 19

In re Lloyd's American Trust Fund Litigation, 954 F. Supp. 656 (S.D.N.Y. 1997) 18

In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987)..... 18

Jeha v. Arabian American Oil Co., 751 F. Supp. 122 (S.D. Tex. 1990), *aff'd without opinion*, 936 F.2d 569 (5th Cir. 1991)..... 19

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)..... 20

Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947)..... 10

Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001)..... 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)..... 26

Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980)..... 10

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)..... *passim*

Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985)..... 27

Saleem Ahmed v. Boeing Co., 720 F.2d 224 (1st Cir. 1983)..... 9

Scottish Air Int'l v. British Caledonian Group, PLC, 81 F.3d 1224 (2d Cir. 1996)..... 19

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)..... 27

Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946)..... 10

Statutes:

22 U.S.C. § 1622 *et seq.* 25

28 U.S.C. § 1350 28-29

28 U.S.C. § 1605(a)(1) 27

28 U.S.C. § 1605(a)(3) 2-3,28

Other Authorities:

Brief for the United States of America as *amicus curiae* filed with the Ninth Circuit Court of Appeals on May 8, 2003, *Doe v. Unocal*, 248 F. 3d 915 (9th Cir. 2001), *reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003) 29

Case of William A. Parker, Gen. Cl. Com'n, United States-Mexico (Convention of 1923), Op. of Commissioners 35 (1927) 15

Ian Brownlie, *Principles of Public International Law* (5th ed. 1998) 13

John B. Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Hein & Co., 1995). 14,15

Louis Henkin, Foreign Affairs and the Constitution 262 (1972) 24

Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. Chi. L. Rev. 180 (1945-1946) 15

Mixed Cl. Com'n, United States-Germany, Administrative Decision No. V 175 (1924) 15

Restatement (Second) of the Foreign Relations Law of the United States (1965)..... 24

Restatement (Third) of the Foreign Relations Law of the United States (1987)..... 12-13,14

Richard B. Lillich and Gordon Christenson, *International Claims: Their Preparation and Presentation* (1962)..... 14

Richard B. Lillich *et al.*, *International Claims: Their Settlement by Lump-Sum Agreements* (1975) 14,25

Richard B. Lillich *et al.*, *International Claims: Their Settlement by Lump-Sum Agreements*, 1975–1995 (1999)..... 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners The Federal Democratic Republic of Ethiopia ("Ethiopia") and The Commercial Bank of Ethiopia ("CBE") respectfully petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing a *forum non conveniens* dismissal of mass claims brought by foreign nationals in favor of the international claims tribunal established to adjudicate such claims.

The court of appeals decision, left undisturbed, would effect a *per se* disqualification of international state-to-state arbitral tribunals as alternative forums to consider such claims where such tribunals require individual claims to be espoused and presented by the state on behalf of individual claimants. Such a rigid restriction on the doctrine of *forum non conveniens* is contrary to the flexible standard set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and by various courts of appeals applying the *Piper* doctrine. This Court has provided no further guidance on the scope of *forum non conveniens* during the twenty-two years since *Piper* and such guidance is now needed to avoid erosion of this important doctrine.

The decision below has important policy consequences. The decision comes at a time when increasing numbers of foreign nationals are bringing actions in U.S. courts under a variety of legal theories. If district courts are not permitted to consider whether a state-to-state tribunal is a preferable forum for the adjudication of foreign disputes, pressures on U.S. courts to hear massive foreign claims will grow even more intense. Such a result is at odds with this Court's

encouragement of the use of international tribunals to resolve foreign disputes and the interest of the United States Government in the conduct of relations with foreign sovereigns.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 390 and reprinted at App. 1a-9a. The unreported order of the district court granting the Petitioners' motion to dismiss on the basis of *forum non conveniens* is reprinted at App. 10a-22a.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2003, and a timely petition for rehearing and rehearing *en banc* was denied on April 18, 2003. App. 23a. The petition for a writ of certiorari was filed on July 17, 2003. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. The Nature of Respondents' Claims.

Respondents are individuals who claim that they were expelled from Ethiopia and their property taken in violation of international law. They brought this suit as a class action to adjudicate the property claims of the Respondents and a proposed class consisting of up to 75,000 persons of Eritrean descent who, they allege, were deported from Ethiopia and had their property confiscated. The suit was brought against Ethiopia, a foreign sovereign state, and CBE, a state-owned Ethiopian public enterprise involved in commercial banking in Ethiopia. Respondents allege, and Petitioners deny, that the district court has jurisdiction under the international takings clause of the Foreign Sovereign Immunities Act

("FSIA"), 28 U.S.C. § 1605(a)(3), which is reprinted at App. 77a. Respondents assert no other basis of jurisdiction.

This is a wholly foreign dispute. No act complained of took place in the United States. At the time the suit was filed, none of the Respondents was a U.S. citizen or resident, and Respondents concede that most of the plaintiffs and class members currently reside in Eritrea. No wrong is claimed to have been committed by the U.S. government, a U.S. corporation, or a U.S. citizen or resident. None of the property at issue here belonged to, or is alleged to have been transferred to, a U.S. corporation, citizen or resident—or to have ever left Ethiopia. The sole basis for alleged jurisdiction in the U.S. courts is that CBE — for purposes unrelated to the subject matter of this suit — maintains correspondent banking and similar relationships with some U.S. companies.

B. The December 12, 2000 Agreement Terminating the Armed Conflict between Ethiopia and Eritrea and Establishing the Claims Commission.

The suit arises out of the two-year military conflict between Ethiopia and Eritrea commencing in May 1998. During the conflict, there were tens of thousands of deaths, injuries and displacements on both sides of the border. Ethiopia denies, however, Respondents' allegation that Eritreans were expelled from Ethiopia because of their ethnicity or that their property was illegally confiscated.

The United Nations, the Organization of African Unity and individual nations, including particularly the United States, exerted significant diplomatic efforts to end the conflict. The United States supported, and helped bring about, the December 12, 2000 Agreement between Ethiopia and Eritrea (the "Agreement") (reprinted at App. 24a-35a) that provided for the termination of hostilities and the resolution of disputes by reference to the arbitral tribunals

established by the Agreement for this purpose. President Clinton's Special Envoy, Anthony Lake, was instrumental in helping to bring about the Agreement, the United States strongly supported it, and Secretary of State Madeleine Albright signed as a witness to it. App. 34a, 36a-40a; C.A. Joint App. A181-82.

Among its provisions, the Agreement established in Article 5 a neutral Claims Commission whose mandate is to decide claims for loss, damage or injury relating to the conflict and resulting from a violation of international law, including claims by nationals of either Ethiopia or Eritrea against the other government or against entities owned or controlled by the government. Decisions and awards of the Commission are final and binding. Ethiopia and Eritrea agree to honor all decisions and to pay promptly any monetary awards rendered against them. App. 30a-33a.

The Commission was constituted in early 2001, and its members are five highly regarded lawyers and judges with extensive experience in the rules of international law, state responsibility and international claims that are central to the resolution of claims such as Respondents'.[1] C.A. Joint App. A185, A225-26, A228-29, A254, A359-363. The Commission has adopted detailed rules of procedure for the conduct of its work, based on the standing rules of procedure of the Permanent Court of Arbitration. C.A. Joint App. A597-611; *available at* http://www.pca-cpa.org/ENGLISH/RPC/Rules of Procedure.pdf. The Commission has already completed its hearings and handed down its liability awards on the claims of Ethiopia and Eritrea for alleged violations of international humanitarian law in the treatment of their

---

[1] The members of the Commission are Professor Hans van Houtte, President, George H. Aldrich, Dean James C.N. Paul, John R. Crook and Lucy Reed.

prisoners of war. *Available at* http:www.pca-cpa.org/ENGLISH/RPC.

C. The Presentation of Respondents' Claims to the Claims Commission.

In accordance with the customary procedure of state-to-state arbitral tribunals such as the Claims Commission, claims of private parties such as the Respondents are prosecuted by the state that espouses the claim on behalf of the private parties. Here, the Agreement expressly provides that, "Claims shall be submitted to the Commission by each of the parties [i.e., Ethiopia and Eritrea] on its own behalf and on behalf of its nationals, including both natural and juridical persons." App. 31a.

On December 12, 2001, Eritrea filed 32 claims with the Claims Commission. One of those claims (Claim No. 15) (reprinted at App. 41a-57a) is "for [p]ersons [e]xpelled from Ethiopia" and seeks monetary compensation for the injuries and losses of such persons, including alleged confiscation of the property of the expellees. App. 41a, 54a. This is the same claim made on behalf of the proposed class in this suit.[2]

---

[2] Eritrea consistently stated its intention of bringing these claims before the Commission. In its initial submission, Eritrea informed the Commission that it would submit claims resulting from "[e]xpulsion [and/or] deportation of approximately 80,000 persons from Ethiopia due to their Eritrean ethnic or national origin" — the same group that Plaintiffs seek to represent in this suit. C.A. Joint App. A243-44. In a May 1, 2001 filing, Eritrea repeated that its claims against Ethiopia would include "[c]laims resulting from the practice of deportation/expulsion based on Eritrean citizenship or national origin" and that "Eritrea will request financial compensation or other relief for … the illegal seizure of real and personal property of persons expelled and/or deported from Ethiopia due to their Eritrean ethnic or national origin…." C.A. Joint App. A262-63.

Further, six of Eritrea's claims filed with the Commission were made on behalf of the persons who are the Respondents in this action (Claims Nos. 27-32). Eritrea states in each claim that it "brings this action on behalf of" Hiwot Nemariam (or other named Respondent) and that "it demands arbitration of the claims of Hiwot Nemariam" (or other named Respondent), asserting that "[t]he Claims Commission has jurisdiction over this action pursuant to Article 5, paragraph 1 of the Peace Agreement." App. 58a, 59a. In each claim, Eritrea asks the Commission to award "Eritrea on behalf of Hiwot Nemariam [or other named Respondent], damages in an amount reflecting the fair market value of her [or his] property at the time of its confiscation," compensatory damages, interest and costs. App. 76a. Eritrea notes that "[t]he takings claim presented herein by Eritrea was filed, as part of a class action, in the United States District Court for the District of Columbia on June 12, 2000." App. 59a.[3]

Neither the Claims Commission nor the parties ever took the position that such claims were not for the benefit of the individuals on whose behalf they would be brought or that awards of compensation would not be made to such individuals. Eritrea specifically told the Claims Commission in describing its "[p]lans for distribution of awards to individuals," that "as a general matter, awards should be given directly to claimants. . . . Financial compensation for large amounts of property damage should also be given directly to the individual victims." App. 7a; C.A. Joint App. 560.

---

[3] Eritrea's Claims Nos. 27-32 appear at C.A. Joint App. A612-A705. Eritrea's Claim No. 27 on behalf of Hiwot Nemariam is reprinted at App. 58a-76a. Eritrea's Claims Nos. 28-32 follow the same structure and state each of the other parties' claims in essentially the same terms as Claim No. 27.

Ethiopia filed Statements of Defense to these claims on June 15, 2002, agreeing that the Commission has jurisdiction over them and should proceed to adjudicate them. C.A. Joint App. A706-717; A741-808. Eritrea has filed evidence in support of the claims, and the Commission has set them for hearing. After completion of the hearing, the Commission will decide the issue of liability and, if liability is found, will render an award of monetary compensation. C.A. Supp. App. A857.

D. The District Court's Dismissal of the Suit on the Ground of *Forum Non Conveniens* and the Court of Appeals' Reversal of the District Court.

The district court granted Petitioners' motion to dismiss the Respondents' suit in favor of the Claims Commission under the doctrine of *forum non conveniens*. In doing so, the district court began by determining whether an adequate alternative forum exists. Following *Piper Aircraft Co. v. Reyno, supra*, the court correctly recognized that "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction" and that "[a] foreign forum is not inadequate merely because it has less favorable substantive law, because it employs different adjudicative procedures, or because of general allegations of corruption in the judicial system." The court also recognized that an alternative forum may not be adequate in the "rare situations" where the remedy offered "is clearly unsatisfactory." App. 14a-15a. The district court then applied the law to the facts of this case and concluded that "the Claims Commission is an adequate alternative tribunal that is more convenient and capable of handling the claims in this case." App. 16a-20a.

Without reaching other arguments raised by Respondents, the court of appeals reversed the district

court's decision because the Respondents' claims were being prosecuted by Eritrea:

> We conclude that the Commission's inability to make an award directly to [Respondent] Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia, render the Commission an inadequate forum . . . .

The court of appeals recognized that the decision was a close one (App. 8a) and that there is nothing in the record to suggest that awards to Respondents will be set off against debts owed by Eritrea to Ethiopia. App. 8a-9a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IMPOSES A *PER SE* DISQUALIFICATION OF STATE-TO-STATE ARBITRAL TRIBUNALS SUCH AS THE CLAIMS COMMISSION FOR PURPOSES OF THE DOCTRINE OF *FORUM NON CONVENIENS* IN CONFLICT WITH THIS COURT'S DECISION IN *PIPER*.

A. This Court in *Piper* Established the Doctrine of *Forum Non Conveniens* as a Broad and Flexible Mechanism to Enable U.S. Courts to Dismiss Claims That Should More Appropriately be Adjudicated in Foreign Forums.

In *Piper*, this Court, building on its analysis in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), applied the doctrine of *forum non conveniens* to judicial forums of other countries. The importance of the doctrine in an ever-shrinking world where foreign claims were increasingly being brought in U.S. courts was apparent. Thus, this Court

recognized the usefulness of the doctrine in dismissing from U.S. courts lawsuits where "[t]he American interest . . . is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here" (*Piper*, 454 U.S. at 261) and in helping to control "the flow of litigation into the United States [that] would increase and further congest already crowded courts" (*id.* at 252).

Nor was the doctrine of *forum non conveniens* to be restricted by the fact that the judicial system of the United States has advantages that make it highly attractive to foreign claimants. In *Piper*, this Court confirmed that the doctrine applies with full force even though the alternate forum may have substantive rules of law less favorable to the plaintiff: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. Likewise, the fact that the foreign forum may not offer the same procedural or substantive protections as U.S. courts is not disqualifying. As stated in *Saleem Ahmed v. Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983) (Breyer, J.), the language of *Piper* suggests that the Supreme Court had in mind "a narrow exception" – one that comes into play if the foreign substantive law is "both different and basically unjust." Consequently, in the twenty-two years since *Piper*, lower courts have applied the doctrine of *forum non conveniens* to dismiss actions in favor of a wide array of foreign judicial and quasi-judicial bodies.[4]

This Court stressed in *Piper* that flexibility is an essential element of the doctrine of *forum non conveniens*, pointing

---

[4] See discussion of *forum non conveniens* decisions of various courts of appeals in Proposition II below.

out (at 249-50) that its prior decisions[5] had "repeatedly emphasized the need to retain flexibility" in the application of the doctrine. "If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." To preserve flexibility, the Court has avoided "lay[ing] down a rigid rule to govern discretion" in the application of the doctrine. *Id.* As this Court stated:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . ..[6]

454 U.S. at 257.

In conducting the limited review of a trial court's broad discretion to make a *forum non conveniens* dismissal, the threshold issue is whether an alternative foreign forum exists and is able to consider the claim. As this Court put it:

> At the outset of any *forum non conveniens* inquiry, the court must determine whether

---

[5] Citing *Gilbert*; *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); and *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549 (1946).

[6] Citing *Gilbert*, 330 U.S., at 511-512; *Koster*, 330 U.S., at 531. The D.C. Circuit has itself in prior decisions recognized the discretion that is to be accorded to the trial court's determination:

> Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another.

Pain v. United Technologies Corp., 637 F.2d 775, 781 (D.C. Cir. 1980)(footnote omitted).

> there exists an alternative forum. Ordinarily this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. *Gilbert*, 330 U.S., at 506-507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. . .

454 U.S. at 255, n. 22.

In the instant case, there is no question that the alternative forum – the Eritrea Ethiopia Claims Commission – exists, has jurisdiction over Respondents' claims, that Petitioners are "amenable to process" before the Commission, and, indeed, that the Commission is now engaged in the consideration of Respondents' claims. Even so, the Court of Appeals reversed the trial court's dismissal on the sole ground that the Commission did not provide an adequate remedy rather than evaluating the adequacy of the forum based on the circumstances of this case or making an analysis of the appropriateness of the dismissal under the balancing factors established by this Court in *Gilbert*.

B. The Decision Below Disqualifies State-to-State Arbitral Tribunals *Per Se* Where State Espousal Is the Procedure by Which Private Claims Are Adjudicated.

The Claims Commission is the tribunal established by international agreement to adjudicate claims by nationals of either Ethiopia or Eritrea against the other government for injuries arising from alleged violations of international law during the 1998-2000 armed conflict between Ethiopia and

Eritrea. It is the tribunal to which every Ethiopian or Eritrean not a party to this suit must look for redress. Like most other state-to-state tribunals, the Claims Commission operates on the principle of state espousal, i.e., the claims of private parties are espoused by the state and presented by the state on behalf of the individual. Respondents' claims in this lawsuit have been espoused and are being presented by Eritrea at the Claims Commission. C.A. Joint App. A612-705; App. 41a-76a.

The sole reason for the court of appeals' reversal of the trial court's upholding of the Claims Commission as an alternative forum was "the Commission's inability to make an award directly to [Respondent] Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia." App. 8a. The court of appeals disqualified the Claims Commission despite the unlikelihood that Eritrea will in fact make such a setoff, and, indeed, despite Eritrea's express statement to the Claims Commission that awards should go to the parties sustaining the damages. App. 7a, 9a.

The effect of the ruling below is to impose a *per se* disqualification of such state-to-state arbitral tribunals as alternative forums in a *forum non coveniens* analysis. The factor the court of appeals determined to be fatal to the adequacy of the Claims Commission is a well-established element of the state-to-state arbitration of private claims and is the customary basis upon which state-to-state arbitral tribunals proceed. A state whose national has suffered injury has, as against the state responsible for the injury, the remedies provided by any international agreement applicable between the two states, and the state may bring a claim for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law. *See Restatement*

(Third) of the Foreign Relations Law of the United States § 713 and § 902 (1987). This state espousal is the mechanism through which the claims of private parties are usually pursued. "Customary international law still maintains the rule that it is the state which has the capacity to present international claims, even though in many cases the claim is substantially that of a private person." Ian Brownlie, *Principles of Public International Law* 596 (5th ed. 1998) (footnote omitted). "Many obligations under international law benefit private persons . . ., but the principal remedies for these obligations are interstate only; international private remedies for violations of international law are still rare." *Restatement, supra.*, Part IX, Intro. Note.[7]

The state's control of the claim is an inherent element of state espousal, even when the state has no intention of exercising it except for the benefit of the private claimant. Nonetheless, recoveries are usually pursued, as by Eritrea, to compensate the individuals for their alleged injuries. Although the tribunals operate on the theory that the state is seeking redress for injury to itself (i.e., through injury to its nationals), the private party is recognized as the real party in interest.

> . . . The [private party] is often consulted or otherwise involved in the claims process. Money damages paid are generally measured, in fact, by the injury to the individual (rather than by the offense to the state), and the state

---

[7] Of course, arbitral tribunals can be established in which private parties are permitted to pursue their own claims. For example, the Algiers Accords establishing the Iran-United States Claims Tribunal made such a provision for private claims in excess of $250,000. However, most private claims against foreign governments are prosecuted through state espousal. Brownlie, *Principles of Public International Law, supra*; Restatement, supra, § 902, Cmt. *i*.

> ordinarily pays over to the person the compensation it receives.

Restatement, supra, §902, Cmt. *i.*

State-to-state tribunals operating on the principles of state espousal are an effective and accepted means of resolving claims of private parties against sovereign states. The United States has itself on numerous occasions as part of the settlement of disputes with foreign nations required that the claims of United States citizens to be prosecuted only through government espousal before a tribunal established for the purpose.[8] As recognized by this Court in *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), "Under [international] agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *See American Ins. Assoc. v. Garamendi*, 2003 U.S. LEXIS 4797 at *46 (June 23, 2003) ("Since claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations' between the countries involved, . . . there is a 'longstanding practice' of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries . . . .") (citations omitted).

From the earliest days of the United States, the President has settled the claims of U.S. nationals against foreign governments by referring the claims to state-to-state arbitral tribunals where they were espoused by the United States. Examples of this long-standing practice include: the

---

[8] *See e.g.*, Richard B. Lillich, *et al.*, *International Claims: Their Settlement by Lump-Sum Agreements* 2, 10 (1975); *see also* John B. Moore, *History and Digest of the international arbitrations to which the United States has been a party* 1037 (Hein & Co., 1995); *see also* Richard B. Lillich and Gordon Christenson, *International Claims: Their Preparation and Presentation* 115 (1962).

Mexican-US Claims Commissions of 1839 and 1849 (settlement of claims of U.S. nationals against Mexico);[9] the Ecuadorian-US Claim Commission of 1863 (settlement of the claims of U.S. citizens against Ecuador);[10] the Spanish Claims Commission of 1871 (settlement of claims of U.S. nationals for their losses during the Spanish embargo of Cuba);[11] the US-British Claims Commission of 1871 (settlement of civil war claims);[12] the Chilean-US Claims Commission of 1892 (claims of US nationals against Chile);[13] the US-Germany Mixed Claims Commission (claims of U.S. nationals arising out of World War I);[14] and the US-Mexico Claims Commission of 1923 (claims of U.S. nationals against Mexico).[15]

In *Dames & Moore, supra*, this Court upheld the President's suspension of U.S. nationals' lawsuits against Iran and the requirement that their claims be brought instead before the Iran-United States Claims Tribunal, in accordance with the President's agreement with the government of Iran. Under the agreement, claims of U.S. nationals of less than $250,000 were required to be presented to the Tribunal by the U.S. government. The preponderance of these claims were espoused by the United States and settled by agreement

---

[9] John B. Moore, *History and Digest* 1227, 1229, 1253.

[10] *Id.* at 1569.

[11] *Id.* at 1037.

[12] *Id.* at 683, 690

[13] *Id.* at 1475

[14] *See e.g.* Mixed Cl. Com'n, United States-Germany, Administrative Decision No. V 175, 192 (1924); *see also* Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. Chi. L. Rev. 180, 182 (1945-1946)

[15] *See e.g.*, Case of William A. Parker, Gen. Cl. Com'n, United States-Mexico (Convention of 1923), Op. of Commissioners 35, 36 (1927); *see also* Koessler, *Government Espousal* at 183

between the United States and Iran without the participation of the claimants. *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997). Thus, the private claims were required to be brought before the state-to-state tribunal and were resolved there through espousal by the United States.

Left undisturbed, the decision below would now rule off-limits for purposes of *forum non conveniens* all international tribunals operating under the principle of state espousal. Yet such tribunals represent a very important mechanism for the resolution of international disputes and their use has been encouraged. Such a result is at odds with both U.S. policy and the prior decisions of this Court.[16]

C. The Court of Appeals' *Per Se* Disqualification of State-to-State Tribunals is Contrary to *Piper*.

The decision below violates the twin principles of flexibility and trial court discretion that this Court required in *Piper*. The court of appeals decided as a matter of law that the principles of state espousal disqualify a state-to-state tribunal as an adequate forum. The court did not attempt to evaluate the unlikelihood that Eritrea, in light of its on-the-record declarations, would nonetheless refuse to turn over any awards to the individual claimants. The court gave no weight to the trial court's view on this matter (App. 16a-20a). Nor did the court consider whether any condition on the dismissal might have cured the perceived defect in the alternate forum.[17] Instead, the court determined as a matter of law that a tribunal which functions on the basis of state espousal is *per se* inadequate for purposes of the doctrine of

---

[16] See Proposition III below.

[17] For example, courts have conditioned *forum non conveniens* dismissals upon reinstitution of the proceeding in the event the alternate forum does not function as expected. *E.g.*, *Ford v. Brown*, 319 F.3d 1302, 1310-1311 (11th Cir. 2003).

forum non conveniens. In creating an inflexible rule of law that such a tribunal cannot be an adequate forum, the court of appeals failed to follow *Piper*.

Moreover, the decision below ignores this Court's test for adequacy of the alternate forum. The court of appeals did state – quoting the applicable language from *Piper* (454 U.S. at 254) – that the "remedy provided by the alternate forum [*i.e.*, the Eritrea Ethiopia Claims Commission] is so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a. But, this statement is purely conclusory; the only basis given for it is Eritrea's ability to set off an award for Respondents against an award in favor of Ethiopia against Eritrea. However, the possibility that Eritrea – contrary to its own indications to the Claims Commission – might theoretically attempt to withhold part or all of an award in favor of Respondents does not equate the process to "no remedy at all." The court of appeals' conclusion is not supported by any analysis. While the court of appeals quoted the *Piper* standard, it failed to give it effect.

II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL APPELLATE COURTS CONCERNING THE ADEQUACY OF ALTERNATIVE FOREIGN FORUMS FOR PURPOSES OF A FORUM NON CONVENIENS ANALYSIS.

In the case below, the District of Columbia Circuit found the Claims Commission to be an inadequate forum for the sole reason that the claims in question must be brought by the state on behalf of the individual claimants. No other circuit has ever disqualified a forum on this or similar grounds. Not only is the decision contrary to *Piper*, it creates a conflict among the circuits with respect to the standard for determining the adequacy of the foreign tribunal for purposes of *forum non conveniens*.

The Second Circuit has found a foreign forum adequate for *forum non conveniens* purposes even though the plaintiffs' government – not the plaintiffs themselves – had control of the claims, including the right to determine how they were prosecuted and whether and on what terms they were settled. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987). The Second Circuit there affirmed a district court's *forum non conveniens* dismissal of 145 consolidated class actions in favor of an Indian court, despite the fact that India barred the plaintiffs from bringing individual claims and granted the government of India the exclusive right to commence and to settle the action as representative of the plaintiffs and their putative classes. Indeed, the court held that "it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal." 809 F.2d at 202. *See also In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656, 673 (S.D.N.Y. 1997) (holding that an alternative forum that recognized "representative actions" was adequate).

Similarly, in *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), *cert denied*, 123 S. Ct. 1928 (2003), the Fifth Circuit held the Mexican forum to be an adequate alternative for purposes of *forum non conveniens* even though Mexican law capped plaintiff's potential recovery at $2,500, an amount so low as to make it impractical for plaintiff to bring an action there. In so doing, the Fifth Circuit conceded that dismissal on the ground of *forum non conveniens* would determine the outcome in the defendant's favor. 301 F.3d at 382-383. The finding in the case below that the Claims Commission is inadequate as an alternative forum because of the theoretical possibility that Respondents might not receive some portion of their award cannot be reconciled with the Fifth Circuit conclusion in *Gonzalez* that the foreign forum was adequate even though plaintiff would recover nothing there.

The Third, Fifth, Sixth and Tenth Circuits, mindful that this Court ruled that to be disqualified a forum must be "clearly inadequate," as where it does not have jurisdiction over the defendant or where it does not permit litigation of the subject matter of the dispute, have upheld *forum non conveniens* dismissal even when the alternative forum does not provide the same procedural guarantees as a U.S. court. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 607 (10th Cir. 1998) (procedural differences do not halt a *forum non conveniens* dismissal in the absence of a "complete denial of due process"); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165 (5th Cir. 1987) ("A foreign forum is adequate . . . even though [the parties] may not enjoy the same benefits they might receive in an American court."); *Scottish Air Int'l v. British Caledonian Group PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) ("the overwhelming consensus of the decisions is that 'the unavailability of beneficial litigation procedures similar to those in federal district court does not render an alternative forum inadequate'"). Similarly, the fact that a forum does not permit class actions does not make it inadequate. *Aguinda v. Texaco, Inc.* 303 F.3d 470, 478 (2d Cir. 2002).

Moreover, several circuits have dismissed claims in favor of non-judicial forums that afford few if any of the procedural safeguards of federal court litigation. *See e.g., Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) (dismissing tort claim in favor of no-fault administrative remedy and explaining that "[t]he district court was not required to ask whether Plaintiffs could bring this lawsuit in New Zealand, but rather, whether New Zealand offers a remedy for their losses"); *Jeha v. Arabian American Oil Co.*, 751 F. Supp. 122, 125 (S.D. Tex. 1990), *aff'd without opinion*, 936 F.2d 569 (5th Cir. 1991) (dismissing medical malpractice claim in favor of quasi-judicial commission in Saudi Arabia).

Even decisions of courts of appeals in which alternative forums have been held to be inadequate do not support the case below. In those cases, the plaintiffs could not obtain *any* relief in the alternative forum because that forum could not hear the subject matter of the plaintiffs' claims under any circumstances (*e.g.*, *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 678-79 (D.C. Cir. 1996) (specific Jordanian laws, decrees and statutes constituted "an absolute prohibition" to any claims against the defendants based on the subject matter of the plaintiff's action)), because physical danger barred plaintiff from the alternate forum (*e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 250-51 (2d Cir. 1995) (ongoing civil war in Bosnia and Serbia)), or because inordinate delays in the alternate court system effectively prevented relief (*Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995) (twenty-five year delays in cases before the Indian courts)).

This Court has not dealt with the substantive requirements of the *forum non conveniens* doctrine in the twenty-two years since it decided *Piper*. The District of Columbia Circuit is now at odds with every other circuit in its approach to determining the adequacy of foreign forums in a *forum non conveniens* setting. The ruling below is especially significant because the court of appeals' decision has disqualified *per se* an entire category of alternate forums. If other circuits were to follow this decision, the utility of the doctrine of *forum non conveniens* would be severely undermined.

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE POLICIES OF THE UNITED STATES REGARDING THE ADJUDICATION OF FOREIGN CLAIMS.

A. The Disqualification of State-to-State Tribunals Is in Conflict with the Decisions of This Court and Lower Courts Upholding the Use of Such Procedures to Adjudicate International Disputes.

The ruling below cannot be reconciled with the decisions of this Court and other federal courts upholding the use of state-to-state tribunals and the government espousal procedure to resolve the claims of private parties arising out of conflicts between nations. State-to-state arbitration is a valuable tool frequently utilized by the United States and other members of the international community as a method of settling international disputes involving claims of private parties. In *Dames & Moore v. Regan*, *supra*, this Court upheld the use of such a tribunal, the Iran-United States Claims Tribunal, and the dismissal of pending claims in U.S. courts in favor of that tribunal. Indeed, in *Dames & Moore* this Court rejected the argument that the Foreign Sovereign Immunities Act ("FSIA") preserved the plaintiff's right to maintain its court action. The Court ruled, "The FSIA was . . . designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments." 453 U.S. at 685 (emphasis in original). Thus, this Court held that a United States national can be required to forego its FSIA lawsuit in favor of a state-to-state tribunal. It is inconsistent with this Court's ruling to hold, as the court of appeals did, that in a proceeding in which virtually every element is foreign to the United States,

the state-to-state tribunal established to hear such claims is unavailable for purposes of *forum non conveniens*.

Subsequent to this Court's decision in *Dames & Moore*, the Court of Appeals for the Federal Circuit upheld the espousal procedure when it considered the challenge to the Iran-United States Claims Tribunal by private parties whose claims were below $250,000 and were espoused and settled by the United States. *Abrahim-Youri v. United States, supra*. As the court put it:

> [Plaintiffs'] property rights . . . were extinguished when the Government espoused and settled their claims. After the espousal by the United States, the choses in action were not simply regulated in some manner, but were terminated; plaintiffs no longer had claims against Iran, but instead a claim against the fund to be allocated by the [Foreign Claims Settlement] Commission.

139 F.3d at 1465-66.

The United States government negotiated with Iran a lump sum in settlement of the claims of these private parties and certain claims of the United States. The government first allocated a portion of the settlement to its own claims, and the remainder was allocated among the private claimants, resulting in their being paid less than full value. The court ruled that a compensible taking had not been established. "[T]he fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." 139 F.3d at 1468.

Thus, U.S. nationals can be lawfully required to submit their claims to a state-to-state arbitral tribunal and to settlement through government espousal. In contrast, foreign plaintiffs in an entirely foreign dispute, the court of appeals

held here, cannot be required to submit their claims to the Eritrea Ethiopia Claims Commission solely because it employs the espousal procedure. The decision below is in conflict with *Abrahim-Youri* because disqualification of the Claims Commission on the basis of its use of espousal cannot be reconciled with the acceptance of espousal as applied to U.S. nationals.

B. The Ruling of the Court of Appeals Is Contrary to the Policy of This Court and the Government of the United States Favoring the Resolution of International Disputes Through Arbitral Tribunals.

The decision of the court below gratuitously undermines the authority and credibility of the Claims Commission, characterizing its efforts as "so clearly inadequate or unsatisfactory that it is no remedy at all." App. 8a. Yet, except for Respondents, every private party with injuries arising out of the conflict between Eritrea and Ethiopia must look to the Claims Commission for redress. The Claims Commission functions under procedures that are well established and accepted in international law. The United States was a leading proponent of the December 12, 2000 Agreement between Ethiopia and Eritrea and creation of the Claims Commission was a key element of that Agreement. App. 39a.

The ruling of the court of appeals is inconsistent with the United States' own practice. As this Court recounted in *Dames & Moore*, 453 U.S. at 680:

> . . . international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its

> sovereign authority to settle the claims of its nationals against foreign countries. . . . Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. . . . [I]t is . . . undisputed that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard to their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 262-263. Accord Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).

The decision below inevitably calls into question the viability of state-to-state tribunals for the resolution of such disputes. The inadequacy the court of appeals found in the claims procedure for purposes of *forum non conveniens* is inconsistent with its use for the resolution of the claims of private United States nationals against foreign governments.

The ruling also casts doubt upon the validity of the practice of settling private claims against foreign governments by means of lump sum settlements negotiated by and payable to the government of the private party on account of the private party's claim. These settlements are negotiated on the principles of espousal and are subject to the same perceived defect – control by the state over the prosecution of the claim and the payment of the award – that the court of appeals held to disqualify the Claims Commission. There have been more than 200 settlement agreements negotiated since the end of World War II which awarded compensation to a state on behalf of its nationals, from which the state through its own mechanism awarded

compensation to individual claimants.[18] Those agreements were negotiated, for example, between West Germany and Poland, Austria and Yugoslavia, Britain and the Czech Republic, Italy and Czechoslovakia, Canada and Romania, Switzerland and Morocco, Britain and Egypt and France and Zaire.[19] The United States has espoused private claims and negotiated settlement agreements with numerous foreign countries. Indeed, the settlement of the less-than-$250,000 claims pending before the Iran-United States Claim Tribunal is an example of this practice. The United States has a permanent standing body, the Foreign Claims Settlement Commission, whose function is to distribute funds received from foreign governments among the various claimants after considering each claim and ruling on its validity. 22 U.S.C. §1622 *et seq.* (2003).

Moreover, the ruling of the court of appeals in effect invites the courts of other states to open their doors to claims by U.S. nationals that the U.S. government has sought to resolve through either an international claims commission or a lump sum settlement agreement. Longstanding U.S. government policy, supported by the Supreme Court, favors the resolution of conflicts between our country and other countries through the use of such dispute settlement mechanisms. *E.g.*, *Dames & Moore*, 453 U.S. at 679. Yet those mechanisms would be ineffective if the U.S. government were unable to assure foreign states that it was capable diplomatically of resolving the claims of U.S. nationals. The United States could not make such assurances if U.S. nationals were capable of submitting their claims

---

[18] See Richard B. Lillich, *et al.*, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, 21 (1999) (listing no fewer than 20 lump-sum settlement agreements from 1975-1995); see also Lillich, et al., *International Claims: Their Settlement by Lump Sum Agreements, supra*, 106.

[19] See Lillich, *International Claims: 1975-1995*, 87-88.

before foreign courts, notwithstanding the fact that the U.S. government had espoused the claims. While the United States cannot control the manner in which foreign courts address claims filed before them by U.S. nationals, assertions by the United States to foreign courts that they should dismiss claims of U.S. nationals in favor of dispute settlement mechanisms created at the diplomatic level would be particularly weak if the decision of the court of appeals in this case is allowed to stand.

This Court has made clear that it favors the resolution of disputes by arbitral tribunals, even when those tribunals do not possess the full attributes of the courts. In *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court upheld the parties' agreement to refer a commercial dispute to arbitration even though it involved issues under the United States antitrust laws. Recently, in *American Ins. Assoc. v. Garamendi*, *supra*, this Court reaffirmed the power and appropriateness of the U.S. government resolving by means of an international commission the claims of U.S. residents relating to the Holocaust era. The Court pointed out that resolving claims through an *ad hoc* commission rather than litigation in the U.S. courts can serve to resolve competing concerns, including the U.S. interest in amicable relationships with foreign countries and the interests of persons in fair and prompt resolution of their claims so as to bring some measure of justice. The decision of the court of appeals disqualifying the arbitral tribunal because its procedures do not provide the same level of assurance as judgments of United States courts is contrary to the policies articulated in *Mitsubishi* and *American Ins. Assoc.*

C. The Ruling Undermines a Necessary Device for Limiting the Litigation of Purely Foreign Disputes in United States Courts.

As this Court noted in *Piper*, one well recognized purpose of the doctrine of *forum non conveniens* is to limit or deny access to U.S. courts for disputes whose predominately foreign characteristics make it inappropriate for the U.S. courts to adjudicate them. 454 U.S. at 251-52, 261. Similarly, in a subsequent decision, when addressing the danger that "a foreign state could consent to suit based on activities wholly unrelated to the United States" so as to invoke FSIA jurisdiction (under 28 U.S.C. § 1605(a)(1)), this Court noted that, "The [FSIA] does not appear to affect the traditional doctrine of *forum non conveniens*," indicating confidence that the doctrine would properly function to exclude disputes that were wholly foreign. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, n. 15 (1983).

The lower courts have also recognized this purpose of the doctrine. The Second Circuit, in upholding the application of the provisions of the FSIA to a case with only a slight nexus to the United States, stated:

> We are not concerned that United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to "international courts of claims." The traditional doctrine of forum non conveniens . . . is still applicable in cases arising under the Foreign Sovereign Immunities Act.

Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 394 (2d Cir. 1985)(citations omitted).

Thus, the doctrine of *forum non conveniens* serves as an important filter to screen out foreign disputes that are

asserted to fall within the letter of the FSIA but that have no relationship of substance to the United States and do not belong in U.S. courts. The present dispute is such a case. This suit has been brought against Ethiopia, a sovereign state, for alleged actions taken in a governmental capacity in Ethiopia during a military conflict between Ethiopia and Eritrea. The claims in question are mass claims of up to 75,000 persons of Eritrean descent for alleged loss of property located in Ethiopia. Nothing involved in the dispute – plaintiffs, defendants, property location, property ownership, alleged wrongful acts – has a U.S. connection.[20]

Forcing this matter into U.S. courts is especially unconscionable when the Eritrea Ethiopia Claims Commission – an international tribunal created with the active support of the United States for this very purpose – has unquestioned jurisdiction over the claims and is currently proceeding to consider them. This is the tribunal that all other private parties – Eritrean and Ethiopians – must look to for the resolution of claims resulting from their conflict. For the benefit of these Respondents alone, U.S. courts would be called upon to adjudicate the claims of a putative class action of up to 75,000 Eritreans and to pass on the propriety of actions of a foreign sovereign. Such a result would severely undermine the utility of the doctrine of *forum non conveniens* in cases involving foreign disputes.

This case is similar in some respects to recent actions brought under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), where foreign plaintiffs have sought to prosecute in U. S. courts claims with little or no connection with the

---

[20] The only basis for jurisdiction is Respondent's allegation, denied by Petitioners, that correspondent banking relationships of CBE – an Ethiopian bank with no U.S. presence – with U.S. banks is a "commercial activity" within in the meaning of 28 U.S.C. § 1605(a)(3), and that the U.S. courts therefore have no discretion to decline jurisdiction.

United States. The United States, through the Attorney General, has recently opposed this use of the ATS, noting that:

> . . . the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatever with the United States.[21]

These same considerations apply with equal force in this case. The dispute here is one that is completely foreign to the United States, and there is no valid reason why it should be adjudicated in the United States courts.

---

[21] Brief for the United States of America as *amicus curiae* filed with the Ninth Circuit Court of Appeals on May 8, 2003, at 2, *Doe v. Unocal*, 248 F. 3d 915 (9th Cir. 2001), *reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003) (Nos. 00-56603, 00-56628).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the decision of the court of appeals.

Respectfully submitted,

W. DeVier Pierson
Counsel of Record
Knox Bemis
Erica L. Salmon
Piper Rudnick LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 371-6000

Attorneys for Petitioners

July 17, 2003